

USDOL/OALJ Reporter

[*Daily v. Portland General Electric Co.*](#), 88-ERA-40 (Sec'y Nov. 6, 1989)

Go to: [Law Library Directory](#) | [Whistleblower Collection Directory](#) | [Search Form](#) | [Citation Guidelines](#)

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

DATE: November 6, 1989
CASE NO. 88-ERA-40

JAMES H. DAILY, JR.,
COMPLAINANT,

v.

PORTLAND GENERAL ELECTRIC CO.,
RESPONDENT.

BEFORE: THE SECRETARY OF LABOR

ORDER TO SUBMIT SETTLEMENT

On June 19, 1989, the administrative law judge (ALJ) in this case arising under section 210, the employee protection provision of the Energy Reorganization Act of 1974, as amended (ERA), 42 U.S.C. § 5851 (1982), submitted to me his recommended decision, consisting of a document entitled Stipulation and Order of Dismissal, signed by counsel for each party and by the ALJ. The Complainant has not signed the order, which purports to be issued pursuant to 29 C.F.R. § 24.5(4) [sic],¹ and which provides that the complaint in this case is withdrawn and the action is dismissed with prejudice. For the reasons discussed below, I cannot accept the ALJ's recommended disposition of this case at this time.

I note first that the ALJ erred in dismissing the complaint pursuant to 29 C.F.R. § 24.5(e) (4). Subsection (e) (4) of 29 C.F.R. § 24.5 is labeled Dismissal for cause, and applies only to involuntary dismissals resulting from certain specified actions of a complainant or a complainant's representative which unnecessarily or unreasonably impede the conduct of the litigation, such as the failure to attend a hearing without good cause. *Stites v. Houston Lighting & Power Company*, Case No. 87- ERA-41, sec. order of Dismissal, September 29, 1989, slip op. at 2. 29 C.F.R. § 24.5(e) (4) (i) (A) . This is not the case here

[Page 2]

where Complainant and Respondent reached a settlement, Hearing Transcript (T.), 143-148, and on that basis filed their stipulation and order of dismissal.

There is no copy of the settlement agreement in the record nor is there any information as to its terms and conditions. The Secretary has held a number of times that a case under the ERA cannot be dismissed on the basis of a settlement unless the settlement has been reviewed and the Secretary has found that it is fair, adequate and reasonable. *See Fuchko and Yunker v., Georgia Power Co.*, Case Nos. 89-ERA-9 and 89-ERA-10, Sec. Order, March 23, 1989, and cases cited therein, slip op. at 2 (copy appended). It is apparent from the record, T. 143-147, that neither the ALJ nor the parties were aware of *Fuchko* and the earlier cases. In addition, the record reflects the ALJ's misunderstanding of the role of the Department of Labor in ERA cases. T. 146. As I held recently in *Polizzi v. Gibbs & Hill, Inc.*, Case No. 87-ERA-38, Sec. Order Rejecting in Part and Approving in Part Settlement Submitted by the Parties and Dismissing the Case, July 18, 1988:

[t]he Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits.² Protected whistleblowing under the ERA may expose not just private harms, but health and safety hazards to the public. The Secretary represents the public interest in keeping channels of information open by assuring that settlements adequately protect whistleblowers. *Cf., Virginia Electric and Power Co.*, 19 FERC para. 61,333 (Federal Energy Regulatory Commission 1982) ("[B]efore approving a settlement, regardless of whether it is contested or enjoys the unanimous support of the parties, the Commission is obliged to make an independent determination that the settlement is just and reasonable and in the public interest.")

Slip op. at 2-3. *See also Thompson v. The Detroit Edison Company*, Case No. 87-ERA-2, Sec. Order Denying Motion to Reconsider, Sept. 29, 1989, slip op. at 4. The United States Court of Appeals for the Ninth Circuit has recognized that in ERA cases "[t]he Secretary must approve all settlement agreements. . . ." *Thompson v. Dept. of Labor*, No. 87-7509

[Page 3]

(86-ERA-27), slip op. 11,195, 11,204 (Sept. 8, 1989).

Accordingly, if the parties intend to resolve this case by settlement, they shall submit a copy of the settlement agreement to me for review within thirty days of receipt of this order. If all parties, including the Complainant, have not signed the settlement agreement itself, the parties shall submit a certification or stipulation, signed by all the parties to the agreement, including the Complainant individually, demonstrating their informed consent to the agreement.

SO ORDERED.

ELIZABETH DOLE
Secretary of Labor Washington, D.C.

[ENDNOTES]

¹The regulations implementing ERA section 10, found at 29 C.F.R. Part 24 (1988), do not contain a section 24.5 (4). The parties and the ALJ apparently meant to reference section 24.5(e)(4).

²I note that in ordinary lawsuits brought by one private party against another private party, where the rights of other persons will not be affected, "settlement of the dispute is solely in the hands of the parties." *United States v. City of Miami*, 614 F.2d 1322, 1330 (5th Cir. 1980), *aff'd in part and reversed in Part on rehearing en banc*, 664 F.2d 435 (1981). Thus, under Fed. R. Civ. P. 41(a)(1)(ii), a stipulation signed by all parties who have appeared in the court action is effective automatically, without judicial involvement. *Gardiner v. A.H. Robins Co., Inc.*, 747 F.2d 1180, 1189 (8th Cir. 1984). The trial court judge must "stand[] indifferent," and not interfere with the parties' "unconditional right" to a dismissal by stipulation. *Id.* at 1189-1190 (citation omitted). *See also Janus Films, Inc. v. Miller*, 801 F.2d 578, 582 (2d Cir. 1986); *City of Miami*, 614 F.2d at 1332.